

¹ ALJ Order (July 5, 2007) (emphasis added in first paragraph).

present evidence and the Judge exceeded his authority by ordering benefits without a preliminary hearing.

Conversely, claimant argues the Board does not have jurisdiction to review a preliminary hearing order authorizing medical treatment and, therefore, this appeal should be dismissed. In his brief filed with the Board, claimant neither addresses respondent's contention that the July 5, 2007, Order for Medical Treatment was entered without a hearing nor any of the other alleged procedural deficits.

The only issues before the Board on this appeal are:

1. Does the Board have the authority to review the July 5, 2007, Order?
2. If so, did the Judge exceed his jurisdiction?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the July 5, 2007, Order should be set aside.

K.S.A. 44-534a grants the Board the authority to review certain preliminary findings that pertain to the compensability of a claim. But the Board also has the jurisdiction to review preliminary hearing orders when a judge has exceeded his or her jurisdiction or authority. The Act reads, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.²

Based upon that provision, the Board has jurisdiction to review the July 5, 2007, Order for Medical Treatment.

This claim has not gone to final award. Thus, the Workers Compensation Act provides a specific procedure for a worker to request a preliminary award of medical benefits. That procedure is set forth in K.S.A. 44-534a(a)(1), which provides:

² K.S.A. 2006 Supp. 44-551(i)(2)(A).

After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

The records from the Division of Workers Compensation do not indicate that a preliminary hearing was held on February 28, 2007. Instead, those records indicate the parties appeared at a pre-hearing settlement conference. Likewise, those same records show that the Judge, on March 1, 2007, issued three separate orders for independent medical evaluations, each with a different physician appointed to perform such evaluation.

K.S.A. 44-534a provides the administrative law judge shall set preliminary hearings and shall give the parties at least seven days' written notice of the hearing date. That was not done.

The Workers Compensation Act also provides an administrative law judge may enter a preliminary award for medical treatment or temporary total disability benefits after making a preliminary finding following a preliminary hearing that a claim is compensable. The Act reads:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, ***except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of***

benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.³

Claimant does not challenge respondent's contention that a preliminary hearing was not held in this claim that led to the July 5, 2007, Order. And this Board Member is unaware of any provision in the Act that authorizes a judge to issue an order for preliminary benefits in the absence of a hearing when the parties do not otherwise agree.

Based upon the above, this Board Member concludes the Judge exceeded his jurisdiction by entering a preliminary award of benefits in a contested matter without following the appropriate procedures for a preliminary hearing. Consequently, the July 5, 2007, Order should be set aside.

WHEREFORE, the July 5, 2007, Order for Medical Treatment is set aside.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

³ K.S.A. 44-534a(a)(2) (emphasis added).